

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.T. BOOKER, E.C. PRICE, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**VICTOR D. JACKSON  
GUNNER'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200900427  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 17 April 2009.

**Military Judge:** CDR Holiday Hanna, JAGC, USN.

**Convening Authority:** Commanding Officer, Maritime Expeditionary Security Squadron TWO, Portsmouth, VA.

**Staff Judge Advocate's Recommendation:** LCDR H.N. Simodynes, JAGC, USN.

**For Appellant:** Capt Michael Berry, USMC.

**For Appellee:** Capt Mark Balfantz, USMC.

**25 May 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PERLAK, Judge:

A special court-martial, consisting of officer and enlisted members, convicted the appellant, contrary to his pleas,<sup>1</sup> of two

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<sup>1</sup> We note that pleas and forum selection were reserved at arraignment and not later entered by the appellant on the record. The court-martial proceeded with all parties clearly understanding that the appellant was pleading not guilty to all charges and specifications. This was in full accordance with both his legal presumption as well as the anticipated pleas found in Appellate Exhibit VI. Likewise, while not stated on the record, in AE VII, the appellant makes a written request, prior to assembly, for trial by members with enlisted representation, in compliance with Rule for Courts-Martial 503, Manual for Courts-Martial, United States (2008 ed.), and the court-martial was

specifications of failing to obey a lawful general order (the Department of the Navy's Sexual Harassment Instruction), and one specification of wrongful sexual contact, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The members sentenced the appellant to confinement for 30 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered the sentence executed.

The appellant initially raised four assignments of error.<sup>2</sup> The assignments now before the court are: First, that the conviction as to Specification 1 of Charge I is legally and factually insufficient because the Government did not prove that Seaman (SN) [KW], USN, perceived a hostile or offensive work environment. Second, that the conviction as to Specification 1 of Charge I is factually insufficient because the Government did not prove that the appellant "grabbed SN [KW]'s breasts," as was charged. Third, that the military judge erred, to the substantial prejudice of the appellant, by admitting evidence of a text message sent by the appellant to SN [KW], when the text message was sent a "couple months after" the time period alleged in Specification 1 of Charge I.

Having reviewed the record and the pleadings of the parties, we conclude that the appellant's first assignment of error is without merit. As to the second assignment of error, we agree with the appellant that the language "grabbing the breasts of" should be stricken from Specification 1 of Charge I. Finally, while there is merit to the appellant's third assignment of error, we hold that there was no material prejudice to the appellant's substantial rights. We therefore will affirm modified findings and affirm the approved sentence. Arts. 59(a) and 66(c), UCMJ.

### **Factual Background**

The appellant was charged with two specifications each sexual harassment and of wrongful sexual contact involving two junior Sailors stemming from two incidents separated by time and

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so composed. We find neither prejudice to the appellant nor reason to question the findings. See *United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005) (holding that absent prejudice to the accused, it was mere procedural error to fail to put forum selection on the record); see also *United States v. Gilchrest*, 61 M.J. 785, 787 n.2 (Army Ct.Crim.App. 2005) (holding that despite failure to plead not guilty, it was apparent from the record that the court-martial proceeded as if not guilty plea had been entered).

<sup>2</sup> Appellant's fourth assignment of error was withdrawn pursuant to a Consent Motion granted by this court on 14 December 2009.

geography.<sup>3</sup> Additional facts necessary to this decision are developed herein.

In April 2007, while stationed at the Portsmouth Naval Shipyard, a junior female Sailor, SN [KW], was directed to report to her unit's armory to help inventory weapons. Record at 206, 209. Shortly after reporting to the armory, she encountered the appellant. *Id.* at 210. After completing her duties, as she attempted to leave the armory, the appellant blocked the door, grabbed her on the hip, and tried to kiss her. *Id.* at 211. SN [KW] moved away to avoid being kissed, while the appellant stated, "I still want you." *Id.* SN [KW] stated that as appellant exited the armory, he grabbed her on the buttocks and again stated "I still want you." *Id.* at 211, 212. SN [KW] did not give appellant permission to do any of this and did not allow him to kiss her, resisting his actions. *Id.* at 213.

SN [KW] also testified that a "couple months" after the April 2007 armory incident, she did receive a text message from the appellant which asked her "what color panties you got on?" *Id.* at 236. She found the text message inappropriate. *Id.* at 238. SN [KW] further clarified that other than the armory incident and until she received the text message, she did not feel that she worked in a hostile working environment in between those two times. *Id.* at 239.

The second incident, giving rise to Specification 2 under Charge I and Specification 2 under Charge II, occurred in October of 2008, while the appellant and SN [AW] were assigned to duties in Kuwait. The facts surrounding this second incident, while in some ways similar to the remaining offense involving SN [KW], need not be developed further as there are no assignments of error relating to these offenses and we find no errors.

### **Legal and Factual Sufficiency**

In his first assignment of error, the appellant contends that the finding of guilty to Specification 1 of Charge I is legally and factually insufficient because the Government did not prove beyond a reasonable doubt that SN [KW] perceived a hostile or offensive work environment. We disagree.

### **Principles of Law**

Article 66(c), UCMJ, requires this court to conduct a de novo review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for factual sufficiency is whether, "after weighing the evidence in the record of trial and making

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<sup>3</sup> The military judge granted a defense motion for a finding of not guilty under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), for one of the wrongful sexual contact allegations. Record at 371.

allowances for not having personally observed the witnesses," this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Id.* at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

### **Hostile or Offensive Work Environment**

The appellant argues that the conviction as to Specification 1 of Charge I is legally and factually insufficient because SN [KW] did not perceive a hostile or offensive work environment.

The conduct in question, to be actionable, need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. Secretary of the Navy Instruction 5300.26D, Encl. 1 at ¶ 3c (3 Jan 2006) (emphasis added). To constitute sexual harassment under Navy policy, behavior must not only be of a certain nature, it must also cause a certain result, namely, interference with victim's job performance or creation of a hostile working environment. *United States v. Swan*, 48 M.J. 551, 555 (N.M.Ct.Crim.App. 1998) (quoting *United States v. Peszynski*, 40 M.J. 874, 881 (N.M.C.M.R. 1994)). If the behavior produces a work atmosphere which is offensive, intimidating, or abusive to another person, whether or not work performance is affected, a type of sexual harassment called "hostile environment" has occurred. SECNAVINST 5300.26D, Encl. 2 at ¶ 3c. It is the requirement of a negative impact upon the work environment that differentiates sexual harassment from other sexual misconduct proscribed in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *United States v. Balcarczyk*, 52 M.J. 809, 811 (N.M.Ct.Crim.App. 2000). Since the person being subjected to the behavior, the recipient, is the one being affected, it is the recipient's perception which controls. SECNAVINST 5300.26D, Encl. 2 at ¶ 3a.

We have examined the record in order to determine whether SN [KW] perceived a hostile or offensive work environment. We conclude SN [KW] was quite clear that she had been sexually harassed by the appellant. Twice during cross-examination, she testified that she felt harassed in the armory, and made it clear that the armory incident was the only time she felt harassed:

Q: After that day, did you feel like you were in a hostile working environment?

A: No.

Q: An offensive working environment?

A: No.

*Id.* at 216.

Subsequently, on re-cross examination, SN [KW] again testified that she felt like she worked in a hostile work environment during the armory incident, but not afterwards:

Q: . . . I asked you if you worked in a hostile working environment, and you said, "no, I did not," is that correct?

A: Other than the armory, no.

W: Maybe I should rephrase that question. You testified earlier that you were not working in a hostile work environment after the incident in the armory, right?

A: After the incident in the armory, no.

*Id.* at 239.

SN [KW] testified that the appellant made unwanted sexual advances towards her. He grabbed her buttocks, blocked the door, and tried to kiss her in the armory. *Id.* at 211, 212. While she did not feel that she worked in a hostile or offensive work environment *after that day*, it is clear that she perceived a hostile working environment during the armory incident itself. Considering the evidence in the light most favorable to the Government, we find the conviction as to Specification 1 of Charge I to be legally sufficient. Additionally, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt as to Specification 1 of Charge I.

#### **Factually Insufficient Portion of Charge**

In his second assignment of error, the appellant alleges that the finding of guilty as to Specification 1 of Charge I is factually insufficient as to the charged "grabbing of SN [KW]'s breasts," because there was no proof that the appellant grabbed SN [KW]'s breasts. We agree.

Accordingly, that portion of the specification which alleges that the appellant violated the order by "grabbing the breasts of" SN [KW] must be stricken. Our action does not affect the sentence that should be affirmed.

#### **Military Rule of Evidence 404(b)**

In his third assignment of error, the appellant contends that the military judge erred, to the substantial prejudice of the appellant, when he admitted evidence of a text message that was sent by the appellant to SN [KW] a "couple months" after the time period alleged in Specification 1 of Charge I. We hold that the military judge erred when he admitted evidence of the subsequent text message, over the defense objection, offered to prove that appellant's actions occurring many weeks later were probative of him creating a hostile work environment for SN [KW], as the evidence only related to an uncharged period of time in

the months following the charged incident in the armory. However, this error did not materially prejudice the appellant's substantial rights.

### **A. Principles of Law**

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The test for admissibility of uncharged acts is "whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the fact finder infer that he is guilty, as charged, because he is predisposed to commit similar offenses." *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989).

We review the military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).

### **B. Discussion**

The Court of Military Appeals provides an analysis for the admission of MIL. R. EVID. 404(b) evidence at trial in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). See also *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006). First, the evidence must reasonably support a finding by the court members that the appellant committed prior crimes, wrongs or acts;<sup>4</sup> second, the evidence must show a fact of consequence is made more or less probable by the existence of this evidence; and third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Id.*

The test articulated in *Reynolds* is aimed at two different considerations: logical relevance and legal relevance. The

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<sup>4</sup> The court is aware that in most cases the act precedes the charged misconduct. On occasion, however, as in the case at bar, a party attempts to introduce evidence of a subsequent act for one of the purposes permitted under Rule 404. Both scenarios involve rulings on efforts to introduce evidence, removed in time from the charged offense, which is neither competent nor admissible for the purpose of establishing the appellant's guilt of the instant offense. Consistent with the jurisprudence catalogued in *United States v. Young*, 55 M.J. 193, 196 (C.A.A.F. 2001), we adopt and apply the *Reynolds* analysis to the military judge's ruling in this case.

evidence of the later text message fails the logical relevance prong of *Reynolds* with respect to both the substantive offense and the appellant's good military character. The military judge therefore abused his discretion when he allowed the evidence of the text message to come before the members.

In applying the *Reynolds* factors to this case, we find that SN [KW]'s testimony with respect to the text message reasonably supports a finding by the court members that the appellant sent this text message a "couple months" after the incident in the armory. We next address whether this evidence makes a fact of consequence more or less probable. In doing so, we concur with the appellant that evidence of the text message is irrelevant as substantive evidence of the appellant's guilt as to the April 2007 incident in the armory. The specification for which this evidence was introduced alleged that the appellant violated the order on or about April 2007. It is quite clear that the appellant's later act of sending a text message, some two months removed from the incident, could not have created a hostile working environment on or about April 2007. The text message regarding underwear could not, therefore, have made a fact of consequence -- existence of the order, duty to obey the order, breach of the order in April 2007 -- more or less likely. See *United States v. Matthews*, 53 M.J. 465, 470 (C.A.A.F. 2000) (error to admit subsequent urinalysis to prove knowing ingestion on an earlier occasion).

Although cross-examination of character witnesses about specific acts is permissible under MIL. R. EVID. 405(a), cross-examination should be limited to acts that would have occurred prior to the crime charged, because the court wants to test character at that time. See *Id.* (citing STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL* 572 (4th ed. 1977)).

During their case, the defense presented evidence of the appellant's good military character through Boatswain's Mate First Class (BM1) [L], the appellant's superior. Record at 406-07. The Government used the text message again in cross-examining BM1 [L], *id.* at 408-09. The relevance of the character trait was at the date of the incident, not some subsequent date or the date of the trial. *Matthews*, 53 M.J. at 470. The text message occurred some months after the date of the armory incident of April 2007. While it might have been improper to use the subsequent text message to attack an opinion of the appellant's character in April 2007, it was not improper to use that same text message to attack an opinion of the appellant's character in October 2008, when the offenses with respect to the other complaining witness, SN [AW], occurred. The sound practice, of course, would have been to provide a limiting instruction with respect to the use of this evidence. We do note that the military judge properly cautioned the members against spillover.

## Material Prejudice

Having determined that the military judge abused his discretion by admitting the evidence, or at least in failing to properly limit its application, we must determine whether this error resulted in material prejudice to the appellant's substantial rights. *Barnett*, 63 M.J. at 397. We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense's case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *Id.*

In the appellant's case, we conclude that there was no prejudice. The order that the appellant was charged with violating proscribed sexual harassment. Creating a hostile working environment was one way to violate the sexual harassment order and, as discussed above, SN [KW] was quite clear that she felt harassed in the armory and found that incident to be a hostile working environment. Another way to violate the order was through deliberate comments and touching, both of which SN [KW] testified to during direct examination. We view the Government's case, therefore, as strong. The defense made no substantial attacks on SN [KW]'s credibility, and while the defense put up a credible good military character defense, the members were entitled to find beyond a reasonable doubt that the appellant's actions in April 2007 violated the regulation. We view the erroneously admitted evidence of the text message as not particularly material, as the direct evidence provided by SN [KW] was legally and factually sufficient. We need not address the quality of the evidence given our resolution of the other prongs.

## Conclusion

Accordingly, Specification 1 of Charge I is modified by striking out the language containing the words "grabbing the breasts of." Because of our action on the findings, we must reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). "A 'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

In reassessing the sentence, we find that there has not been a dramatic change in the sentencing landscape. The appellant remains convicted of the specifications under Charge I, as modified, and the remaining specification under Charge II, violations of Articles 92 and 120, UCMJ. He was sentenced by the members to 30 days confinement and a bad-conduct discharge. As reassessed, we conclude that the sentence is both appropriate and

is no greater than that which would have been imposed had the members found the appellant guilty of the remaining specification under Charge I, without the language, "grabbing the breasts of."

The finding as to Specification 1 of Charge I, as amended, is affirmed. The remaining findings and sentence are affirmed.

Senior Judge BOOKER concurs.

PRICE, Judge (concurring in part and in the result):

I concur in the majority's disposition of the appellant's three assigned errors. However, I resolve the appellant's third assigned error for slightly different reasons from those stated in the lead opinion. Accordingly, I respectfully file this separate opinion.

In my view, the military judge did not err by allowing the Government to, on redirect of Seaman (SN) [KW], conduct limited inquiry into the offensive text message she received from the appellant. Record at 227-28, 232, 236-37. Specifically, I conclude that trial defense counsel's cross-examination of SN [KW] elicited testimony suggesting that after the incident in the armory, she did not perceive a hostile or offensive working environment. Trial defense counsel's questions potentially misled the members and "opened the door" to SN [KW's] testimony regarding the appellant's text message inquiry into the color of her underwear. See *United States v. Banks*, 36 M.J. 150, 162 (CMA 1992) (party may open door to rebuttal evidence "by introducing potentially misleading testimony").

I conclude that the military judge did not abuse his discretion by, over defense objection, allowing the Government to conduct limited inquiry into the contents of this text message.

For the Court

R.H. TROIDL  
Clerk of Court